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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 607

MERREL P. CALLAWAY, as Trustee of the Property of Central of Georgia Railway Company, Debtor, et al.,
Petitioners,

vs.

L. O. BENTON, JR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Dated: March 13, 1948.

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(The numerals in parenthesis refer to the pages of the Record)

I

Seaboard Air Line Railroad Company v. Daniel, decided by the Supreme Court February 16, 1948, is decisive of this case.

This case is reported in Volume 92, No. 10, U.S. Supreme Court Law Ed. Adv. Op. 409.

This case did not come to our attention until after the printer's proof came to hand, hence it is cited separately and not in its proper order in the brief.

The case decides that the Interstate Commerce Commission has exclusive and plenary jurisdiction over the consolidation or acquisition of railroad carriers; and that, notwithstanding the Constitution and laws of South Carolina, which provide that railroad lines within that State can be owned and operated only by State created corporations, and that a railroad corporation chartered only under the laws of another State is forbidden under heavy penalties to exercise such powers in South Carolina, the Interstate Commerce Commission had power to set aside the Constitution and laws of South Carolina, and to authorize the Seaboard Air Line Railroad Company which was chartered only under the laws of Virginia, to own and operate a railroad line in South Carolina, the Commission having found that compliance with the South Carolina law would not be consistent with the public interest.

The Benton case in the State Court seeks not only to take away from the Interstate Commerce Commission its exclusive and plenary jurisdiction to pass on the aquisition of South Western by the reorganized Central of Georgia, but it seeks to absolutely prohibit the acquisition by an injunction against the Officers and Directors of South Western, on the theory that South Western has no power under its Charter to convey its property. The interlocutory injunction, granted on his own motion, by the State Court Judge, prohibits the acquisition except on the unanimous vote of the stockholders of the South Western, which is equivalent to prohibition.

The decision of the Circuit Court of Appeals in the case at bar is wholly at variance with this decision of the Supreme Court.

II.

The contention of Respondents that the Petition does not comply with Supreme Court Rule 38.

The contention is that Rule 38 (2) requires that the petition shall contain "the questions presented". The petition asks for the writ of certiorari to review and reverse the judgment of the Fifth Circuit Court of Appeals, and the questions presented on which the Petitioners desire a review of the decision and judgment of the Court of Appeals, are set forth specifically in Paragraph 14 of the petition, pages 7 to 13. Of course, the Court, if it wishes, may grant the certiorari and limit its review as it pleases.

Several decisions are cited by Respondents to the effect that the Court will consider only questions specifically brought forward in the petition for certiorari. No one denies this proposition, and for this very reason, Petitioners stated specifically the questions on which they desired a review of the decision of the Fifth Circuit Court of Appeals.

III

The exclusive jurisdiction of the Bankruptcy Court and the Interstate Commerce Commission does not turn on the attenuated theory that the reversionary interest of South Western is not in the possession of the Bankruptcy Court.

(1) The subject matter of the case in the Bankruptcy Court is the reorganization proceeding and all the claims, issues and controversies relating to or affecting the formulation, acceptance and carrying out of the Plan. The offer made to South Western, its ac-

ceptance or rejection thereof, the disaffirmance of the lease, the conveyance which South Western must make to the reorganized Company, are all within the orbit of the jurisdiction of the Bankruptcy Court and the Commission. It is not only a question of possession of property, it is primarily a question of subject matter, of which the Bankruptcy Court had, unquestionably, prior jurisdiction.

(2) The South Western is a party to the Bankruptcy proceeding. The facts on which this statement is rested are contained in the findings of fact by the District Court (65); and on the conclusion of law stated by the District Court that "South Western is a party to the reorganization proceedings and to the Plan for all purposes connected with the Plan." (75).

(3) South Western is a creditor by virtue of the fact that it holds a claim against the Debtor under an unexpired lease (Conclusion of Law of the District Court (75)).

Sub-section (b) of Section 77 of the Bankruptcy Act.

(4) When and if the reorganized Company acquires the railroads of South Western, it will acquire not only the leasehold interest of the Central but also the reversionary interest of South Western. The property in so far as the acquisition of it under the plan is concerned, cannot be split up into two parts, one leasehold interest and the other reversionary interest. The railroad, which is the thing the reorganized Company will acquire, is in the physical possession of the Bankruptcy Court.

IV

Judicial Code Section 265 is not applicable to a case like this.

Respondents argue at length that this Judicial Code Section is applicable to this case. If there is one thing which is definitely settled by the decisions of this Court, it is that this Judicial Code Section is not applicable to a case like this.

Judicial Code Section 265 (28 U.S.C.A. Sec. 379), provides "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The Statute itself excepts injunctions authorized by any law relating to proceedings in bankruptcy. The Bankruptcy Court is not at liberty to surrender its jurisdiction in a case like this (see cases cited on page 20 of our brief in support of the petition).

A Court of the United States is not prevented from enforcing its own judgments by this Statute.

Dietzsch v. *Huidekoper*, 103 U.S. 494, 497.

"The use of the writ of injunction, by Federal Courts first acquiring jurisdiction *over the parties or the subject matter of a suit*, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished, and complete justice done between the parties, is familiar and long established practice ** Section 265 of the Judicial Code *** has repeatedly

been held not applicable to such an injunction". (Citing many cases).

Looney v. *Eastern Texas R. Co.*, 247 U.S. 214, 221.

"This Section (265) is to be construed in connection with Section 262 which authorizes the United States Courts 'to issue all writs not specially provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and, agreeable to the usages and principles of law.'*** It is settled that where a Federal Court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction, where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court."

Kline v. *Burke Construction Co.*, 260 U.S. 226, 229.

"Having possession, the Court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same *** The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them."

Ex Parte Baldwin, 291 U.S. 610, 615.

"The proceeding being ancillary and dependent, the jurisdiction of the Court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved and notwithstanding the provisions of Section 265 of the Judicial Code (citing many cases). These principles apply to Bankruptcy proceedings (citing many cases)."

Local Loan Co. v. *Hunt*, 292 U.S. 234, 239, 240.

In *Continental Bank* v. *Rock Island R. Co.*, 294 U.S. 648, the Bankruptcy Court was not in possession of the collateral which the note holders were enjoined from selling. The Court, nevertheless, held that it had power to issue the injunction because the sale of the collateral might adversely affect the reorganization proceedings. Judge Hutcheson in his dissenting opinion in this case quotes especially from the Rock Island case as follows: "A proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which is the sole aim of the Section, and thereby to render its provisions futile."

V

The Benton case is a flagrant interference with the jurisdiction of the Bankruptcy Court and with the exclusive powers of the Commission.

The Benton case is predicated upon the proposition that South Western has no power, whatever, to sell its property, not even by the unanimous vote of all its stockholders. It sought to stop the Stockholders from voting at all on the question of the acceptance or rejection of the plan of reorganization, and it prayed the Court to enjoin the Officers and Directors of the South Western from "doing or performing any act in behalf of the South Western which might tend to consummate the plan of reorganization of Central of Georgia Railway Company with respect to the acquisition of the properties of the South Western Railroad

Company" (157). After the United States District Court had enjoined the parties in the Benton case from prosecuting that proceeding, the Judge of the State Court, of his own motion, issued his injunction against the Officers and Directors of South Western in the exact language of the prayer of the petition quoted above, with the qualification unless "authorized by a unanimous vote of the stockholders of the defendant Company".

It should be noted that the Trustee of the Debtor was not made a party to this proceeding. He was ignored. This Benton case is an obvious and flagrant attempt to break down the reorganization plan in so far as it concerns the South Western and trespassed on the subject matter of which the Bankruptcy Court and the Commission had exclusive jurisdiction.

VI

The Interstate Commerce Commission has exclusive jurisdiction over the acquisition of the property of one interstate carrier by another interstate carrier.

(The provisions of the Interstate Commerce Act referred to under this heading are contained in Appendix No. 1 of our brief in support of the petition).

(1) Section 5 of the Interstate Commerce Act deals with this subject. According to Section 5 (11) the authority of the Commission is "exclusive and plenary". If there is any law of the State of Georgia which comes into conflict or impairs the power of the Commission in this matter, it is void and of no effect because this Act of Congress has taken exclusive jurisdiction of this subject matter. Section 5 (11) expressly

relieves any person participating in the transaction "from the operation of the Anti-Trust laws and of all other restraints, limitations and prohibitions of law, Federal, State or Municipal, in so far as may be necessary to enable them to carry into effect the transaction". It is further provided in Section 5 (11) that "any power granted by this Section (Section 5) to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter and under the laws of any State."

(2) The Benton case proposes to run around and ignore this exclusive power of the Commission and to absolutely prevent and prohibit the acquisition of one interstate carrier by another, although the State Court and the State law have absolutely no authority in the premises.

(3) The Benton case is premature, it does not give the Commission any chance to pass on the question of the acquisition. It prejudges this question. The Commission has not yet had a chance to act on it. The last provisions of the Plan (quoted page 64 of the Record) "That nothing herein contained shall be, or be construed as a grant of authority for the issue of any securities, the assumption of obligations, transfers of any property, sale, consolidation or merger of the Debtor's property or pooling of traffic pursuant either to the Bankruptcy Act or the Interstate Commerce Act, until further action by this Commission upon confirmation of the Plan by the Court". The language quoted paraphrases a portion of Sub-section (f) of Section 77 of the Bankruptcy Act (quoted in Appendix No. 1 to our brief in support of the petition). The Commission has not yet acted on the transfer or acqui-

sition of South Western. The Plan has been confirmed by the Court, but the Commission has not yet taken this necessary step.

(4) In the two recent cases of *Smith v. Hoboken R.R. Co.*, 328 U.S. 123, and *Thompson, Trustee,* v. *Texas Mexican Ry. Co.*, 328 U.S. 134, this Court stayed proceedings in the first case in the United States District Court and in the second case in a State Court, because the Interstate Commerce Commission had the primary right under Section 1 (18) of the Interstate Commerce Act to determine the disposition of a leased line and decide whether it should be taken into the reorganization proceedings of the Lessee. These cases are binding authority on the Court of Appeals, on the proposition that the Interstate Commerce Commission has plenary and exclusive jurisdiction to pass on the question of the acquisition of the South Western, and that the proceeding in the State Court in the Benton case was an infringement of the jurisdiction of the Commission.

(5) Even if there were any obstacle in the State law to the acquisition (which we contend there is not), both the Commission and the Court could by-pass it and set it aside if the acquisition was in the public interest. This Court and the Commission has done so on several occasions (see cases cited pages 15 and 16 of our brief in support of the petition).

VII

In putting the Plan in operation the Bankruptcy Court is not subject to the restraint of any State law or decision and hence the jurisdiction of the Bankruptcy Court is exclusive in this matter.

Sub-Section (f) of Section 77 of the Bankruptcy Act provides that the Reorganized Company shall have

full power and authority to put the plan into effect and to carry out the plan and the orders of the Judge relative thereto, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding".

This is a warning to the State authorities to keep their hands off the reorganization plan.

VIII

Section 5 (11) of the Interstate Commerce Act provides that a sale or consolidation or merger may be accomplished by a majority vote unless a different vote is required under applicable State laws.

(1) In this case a majority of the stock of South Western has voted to accept the plan. There is no applicable State law in Georgia which requires any different or greater vote.

(2) Sections 94-328 and 94-329 of the Code of 1933 of Georgia (which are quoted in Appendix No. 2 of our brief in support of the petition), specifically authorize a railroad corporation in the situation of the South Western to sell its property on the vote of a majority of its stock. This Statute was passed for the benefit of the South Western. A Receiver was appointed for the properties of the Central December 1932 (61). These Code Sections were passed in 1933 because the South Western did not have any express authority under its Charter to sell its property, and this law was passed for the relief of South Western.

But Respondents say that South Western has never accepted this law as an amendment of its Charter and it could not accept except by unanimous vote of its

Stockholders, because otherwise their contract would be impaired. By these Code Sections and two others which are hereafter cited, the State of Georgia has given its assent to this quasi public corporation to sell its railroads. The Charter of the South Western does not prohibit the sale of the railroad, it is simply silent on the subject. There is no contract among the Stockholders that the railroad shall never be sold, no matter how necessary it might be to sell it for the protection of the Stockholders and to prevent irreparable loss. The State, by passing the Act of 1933 codified in Code Sections 94-328 and 94-329, did not impair any contract, it simply gave to the stockholders much needed relief. If the South Western cannot sell or lease its property in any event or if it requires unanimous stockholder consent, it is in a bad predicament considering its situation.

IX

Sections 94-311 and 94-318 of the Code of 1933 of Georgia both give the Central and the South Western power to sell or consolidate their properties.

Both of these Code Sections are quoted in Appendix No. 2 of our brief in support of the petition.

These Code Sections are a part of the General Railroad law of the State of Georgia under which the Debtor was incorporated. They permit connecting railroads whether incorporated under the general railroad law or incorporated under any other law to consolidate, merge or sell their railroads to the other. Under these Code Sections the Central can acquire South Western and South Western can sell to Central. These Code Sections in no sense impair the contract between the

stockholders of South Western, and what we have said about Code Sections 94-328 and 94-329 applies equally here. Judge Speer decided in *Dady* v. *Georgia & Alabama R. Co.*, 112 Fed. 838, that although these Statutes did not specify the vote of Stockholders, that a majority vote of the stock was proper corporate action.

X

The case of Alexander v. Atlanta & West Point Railroad Company, 108 Ga. 151, does not militate against our position.

This case is so strongly relied on by Respondents that we wish to point out just what it does decide and what it does not decide. The Atlanta and West Point Railroad Company was chartered under a special Act of the General Assembly before the General Law for the incorporation of railroads was passed. Under the general railroad law a railroad corporation which had been previously chartered was permitted to adopt and make a part of its charter the general railroad law. The Stockholders of the Atlanta and West Point Railroad adopted the general railroad law as a part of its charter, but not by a unanimous stockholder vote, and under the authority of the general railroad law it was attempting to build a belt line railroad around Atlanta, Ga. The Supreme Court had on numerous occasions decided that where a proposed amendment to a charter was fundamental, radical or vital unanimous consent of Stockholders was essential. The Supreme Court decided that the adoption of the general railroad law in its entirety was a fundamental change in the Charter of the Atlanta and West Point Railroad, but the Court expressly declined to decide the question whether the Company could acquire power to construct a belt line without unanimous consent. A reading of the

last paragraph of the decision will show how the Court limited its decision. This is a very different proposition from whether South Western could avail itself of the provisions of Code Sections 94-328, 94-329, 94-311 and 94-318 the use of neither of which would work a fundamental or radical change in its charter such as to impair the contract between the stockholders. As we have pointed out in our brief in support of the petition, pages 21 to 23, a corporation in the predicament in which South Western finds itself, is not bound to languish and die for want of unanimous consent of stockholders. And there is no decision in Georgia which holds that unanimous consent is necessary in the circumstances in which South Western finds itself. The Judge of the State Court did not have before him the facts and circumstances which are in evidence in this case as to the exigencies of South Western, and it is believed that he would not have decided that under these circumstances unanimous stockholder consent was necessary. Obviously, if the Benton case is an invasion of the exclusive jurisdiction of the Bankruptcy Court and the Commission, it is a mere nullity, which no Court has to follow.

XI

The question of the acquisition of South Western is a Federal question and not a question of State laws.

The Federal Statute, Section 5 of the Interstate Commerce Act, governs the question and under paragraph 11 of the Section the jurisdiction of the Commission is exclusive and plenary. But even if it were a question of State law the Federal Bankruptcy Court in the administration of the proceeding had the exclusive right to determine the question, and if the minority

stockholders of South Western wished to raise such a question they should have come into the Bankruptcy proceeding, because the acquisition of South Western was a part of the Bankruptcy proceeding and the Bankruptcy Court had exclusive and prior jurisdiction over the subject matter.

The Federal Courts have power and jurisdiction to decide questions of State law wherever necessary to the rendition of a judgment.

Meredith v. *Winter Haven*, 320 U.S. 228, 234, 237.

In re *New York, N.H. & H.R. Co.*, 54 F. Supp. 595, 624.

Respondents' brief says at page 52 "The Commission in the plan did not authorize a purchase, merger or consolidation on the vote of a majority of the stock or on any other vote. The plan simply authorized the Debtor to acquire the properties of the South Western on the terms stated." Naturally, the plan did not carry any provision on this subject, because Section 5 (11) of the Interstate Commerce Act expressly provides that the acquisition may be had on a majority vote of stock unless a different vote is required under applicable State law.

XII

The United States District Court had the right to pass on the question whether unanimous stockholder consent was necessary in order for the reorganized company to acquire the South Western and the Court concluded that such consent was not necessary under either the Federal statutes or the State law.

All the parties were before the United States District Court. The minority stockholders were challenging the right of acquisition without unanimous stockholder

consent, and as the question bore directly on the subject matter of the reorganization plan as it related to South Western, the United States District Court necessarily passed on that question. It was its right and duty to do so. (See the decision of the United States District Court on this subject, pages 83-89 of the Record). The majority opinion of the Court of Appeals never reached this subject, because it decided that the State Court had the power to decide this question, and that in undertaking to decide it, the jurisdiction of the Bankruptcy Court and the Commission was not infringed.

This Court if it grants certiorari will either pass on this question or decide the case in such a way that it will not be necessary to pass on the question.

XIII

Comments on Respondents' Statement of Facts.

(1) On page 9 of Respondents' brief it is stated "South Western is a prosperous and going corporation, able to achieve the objects of its incorporation". The railroads of South Western have been operated continuously since 1869 by its Lessees (62). It has no operating organization and no equipment or appliances (71). It is in no position to operate its own property (72). It would cost $10,000,000 to buy the necessary equipment (71), and more than $9,000,000 for necessary capital and additions and betterments (71, 72). At normal levels of business the operations of South Western have resulted in large annual losses for many years past (69, 70). It is estimated that if South Western had been operated by Central for account of South Western it would have had an operating deficit, for the year 1946, of $442,754, and for the first three months of 1947, an operating deficit of $201,348 (69).

There are four letters in the record (111 to 128) written by the President of South Western to its stockholders setting forth the reasons why it would be suicidal for the stockholders of South Western not to accept the plan of reorganization. In the exigencies in which South Western finds itself, even though it had no statutory authority to sell its properties, it would have power to do so on the vote of a majority of its stock, and that is the general rule in Georgia and elsewhere as pointed out in our brief, p. 21.

(2) On page 9 of Respondents' brief it is stated the Capital Stock of South Western is 51,191 shares of the par value of $100 per share and that 50,471 shares were outstanding in the hands of the public. This statement is incorrect, in that it states 720 shares are not outstanding in the hands of the public. We presume that it was meant to say that the 1440 shares of South Western owned by Central and pledged by it under its Consolidated Mortgage (60), were not outstanding in the hands of the public, but the 1440 shares are outstanding in the hands of the public notwithstanding Central has an equity in them.

(3) On page 9 of Respondents' brief it is stated that South Western in its Report made to Stockholders March 13, 1947, stated "its road and equipment property are worth $9,523,736.81 and therefore its Common Stock had a book value in excess of $180 per share." The book value is made up of the Capital Stock $5,191,100 plus a write up of $4,247,661.27, which represents additions and betterments put on the property by the Lessees from 1869 to 1913, plus miscellaneous items of $84,975.54 (68).

(4) On pages 9 and 10 of Respondents' brief, it is stated that "In 1942 the Interstate Commerce Commission valued the road and equipment property at $12,830,257. According to this valuation its Common Stock would have a value based on fixed assets alone of approximately $240.00 per share". The District Court in its findings of fact (68) states that the Interstate Commerce Commission's valuation is "cost of reproduction less depreciation", and that "The book value and the Interstate Commerce Commission's valuations were before the Commission and the Court when the allocation of securities was made to South Western under the plan."

The allotment made to South Western under the plan was litigated by South Western. The allotment was approved by the Court and there was no appeal from the judgment of the Court (65, 66). The question is res adjudicata.

(5) On page 18 of our brief in support of the petition we say "The Commission has decided that it is in the public interest that the reorganized Company should acquire the railroad properties of South Western, because it is an integral part of the system of the Central". On page 54 of Respondents' brief it is stated "We respectfully differ with this statement, and assert that the Commission decided no such thing". The acquisition of South Western was an important part of the reorganization plan, otherwise the Commission would not have authorized its acquisition by the reorganized Company. The Commission in the last sentence of its Report on the plan states, "We find that the plan herein approved would be compatible with the public interest" (64). On page 10 of their brief Respondents

state "The South Western comprises some 340 miles of railroad, bridges and depots and appurtenances thereto in the heart of the system of the Central of Georgia Railway *** Without the South Western the Central of Georgia could not operate trains from Florida through Macon and the Northwest. Without the South Western the Central could not operate trains from the coal fields which it touches at Birmingham and vicinity to Savannah and coast. Without the South Western the Central would have no line from Macon to Alabama."

The Commission in its report on the plan stated with reference to South Western (261 I.C.C. Rep. p. 305), "This property is a large and important one comprising no less than 18.25 per cent of system mileage and carrying a comparable proportion of all system traffic".

Respectfully submitted,

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